Supreme Court, U.S.
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No. 07-328

In the

Supreme Court of the United States

DAVID H. HAYNES,

Petitioner,

v.

THE CITY OF CIRCLEVILLE

and,

WAYNE GRAY, individually and
in his official capacity as Chief of Police,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 7, 2007

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QUESTIONS PRESENTED

1. Whether criticism by a police K-9 officer that inadequate use-of-force training will result in public harm is protected speech under the First Amendment?

2. Whether a complaint of perceived "public harm" is entitled to greater protection under the First Amendment than a complaint of "public concern" and should it win favor under the balancing test of *Pickering v. Board of Education of Township High School District* 205, *Will County*, 391 U.S. 563 (1968) except for the most disruptive of circumstances?

3. Whether this Honorable Court intended to hold by its decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) that whistle blowing is always an official duty of every police officer thereby depriving him of First Amendment protections for disclosure of a dangerous use of force policy that will result in public harm?

4. Whether the First Amendment protects against retaliation for refusing to lie under oath?

5. Whether a Court of Appeals must remand a case in order to supplement the record when Supreme Court precedent intervenes?

PARTIES

Petitioner, David H. Haynes, was a City of Circleville police officer assigned to the canine unit. Respondent, City of Circleville, is the governmental authority over the police department and is the entity that actually fired Petitioner. Respondent, Wayne Gray, is the Chief of Police for the City of Circleville, Ohio who initiated Petitioner's firing.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David H. Haynes, respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the District Court denying summary judgment to Defendants is not published but is reported at 2005 WL 3263313 and is reproduced in Petitioner's Appendix at p. 19a.

The opinion of the Court of Appeals reversing the District Court and granting summary judgment is reported at 774 F. 3d 357 and is reproduced in Petitioner's Appendix at p. 3a.

The order denying rehearing En Banc is not reported at but is reproduced in Petitioner's Appendix at p. 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 25, 2007. A petition for rehearing En Banc was timely filed and denied on June 15, 2007. Pursuant to S. Ct. R. 13.1 this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PRECEDENT INVOLVED

This civil action was filed under 42 U.S.C. § 1983. At the time of the filing of the complaint and at the time summary

judgment for Defendants was denied, First Amendment precedent did not include "official duty" as a complete defense. This appeal involves the proper application of *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) to deny a First Amendment claim without remand.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District

of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

Petitioner filed his civil rights action in Pickaway County Ohio Common Pleas Court. Because it was based upon a Federal question, it was properly moved to the United States District Court, Southern District of Ohio, Eastern Division, Columbus, Ohio. Respondents moved for summary judgment which was denied. Respondents appealed the issue of immunity pursuant to 28 U.S.C. § 1291. After Respondents' brief was filed and after Petitioner's response brief was filed but before Respondents' reply brief was filed, this Honorable Court decided *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), which precedent was orally argued.

A three-judge panel Court of Appeals outright reversed in favor of Respondents and dismissed the entire action based upon the precedent of *Garcetti v. Ceballos, supra.*

A petition for En Banc rehearing was denied.

David H. Haynes has been a police officer with an unblemished record since 1987. His professionalism, knowledge, experience and dedication were not in question. When he joined the Circleville Police Department in 1991 he brought with him substantial police and K-9 training. He originated the idea to create a K-9 unit for Circleville. He prepared a feasibility study, obtained council approval, selected the dog to be purchased and trained it. He developed a written, detailed canine Standard Operating Procedure Manual (SOP). The Chief acknowledged that David Haynes' program was "above and beyond". David Haynes was, in his

own right, an expert by education, formal training and on-the-job training as to all aspects of a K-9 program.

The SOP Manual provided for formal in-service training which took place at a training facility in Dublin, Ohio. Notably, the SOP stated deployment of the K-9 dog to apprehend is a use of force subject to the general use of force policy in effect.

Due to budget issues in 2000, Chief Gray considered reducing canine training. Petitioner submitted a cost feasibility study which supported the program. He wrote a memo to the Chief that stated reduced training would adversely affect the program and it "will eventually catch up, and cost you more than you ever imagined". The memo prompted a study by Petitioner's superior, Lt Gaines, that concluded "whether we agree with these reasons or not, if we reduce training we could be faced, at some time in the future, with a claim that we failed to provide adequate training to the K-9 unit and be forced to have an expert witness to testify against the trainer whose services we have used for the last three and one-half years"(the formal Dublin trainer). There was no reduction in training.

Petitioner took a leave of absence to be a U.N. police officer in Kosovo. Upon his return he was immediately rehired without question. However, at rehire Petitioner extracted a promise from Chief Gray that training would not be reduced or compromised.

Chief Gray unilaterally reduced training, formal and informal. Petitioner sent Chief Gray a dire consequence memo (which Petitioner claims was the reason he was fired) which criticized that decision. The Chief replied in a dueling memo that he felt Petitioner's statements were threats (the

"you must testify" claim). Petitioner was fired. The termination letter referred specifically to the memorandum.

The City claimed various alleged reasons adequate to justify firing including refusal to perform decoy training, failure to respond to a call, failure to undergo a fitness-for-duty examination, a Christmas wrapped box containing his recalled K-9 uniforms and threats to prosecute as trespassers police messengers all of which were disputed and all of which were found by the trial court to be questions of fact in regard to insubordination. They are not relevant to a summary judgment dismissal.

Petitioner sued claiming that he was not a disgruntled employee complaining about work hours and conditions. He expressly stated he would follow the new training schedule. He was acutely aware that deployment of a K-9 is the employment of use of force equal to at least a night stick or a taser. An inadequately trained officer who deploys an inadequately trained K-9 will result in harm to a citizen. The dog must be constantly trained in real life situations. Self-training is inadvisable because the officer makes up the test and grades himself. The required props and drugs are not available. The unsuspecting public is the practice subject. Proper documentation and annual review of the dog's actions are crucial in determining if the dog needs additional training. It is absolutely essential to determine if the number of bites is justified. There is an acceptable bite ratio (total number of bites divided by the number of commands to bite). If training cannot be sustained, the dog must be taken out of service. Petitioner warned that an inadequately trained K-9, kept in service, would probably result in: (1) attacking without command, (2) failing to recall upon command, (3) failing to release upon command, (4) biting innocent bystanders, (5) false drug alerts with the result that he would be unable to

testify truthfully in court that the alert was valid for probable cause search purposes. Petitioner's concerns were not of recent origin, were not frivolous, but were studied and genuine. The focus of his speech was directed solely to protect the public from an inadequate use of force policy. He was willing to accept the fact that the dog would be taken out of service if funding was cut.

REASONS FOR ALLOWANCE OF THE WRIT

A. It must be determined that, in the hierarchy of protected speech, the right to warn of physical danger is paramount

This Court has never addressed the issue whether or not the hue and cry of a police officer that inadequate use of force training will result in harm to the public is protected by the First Amendment. Since it is not protected in the Sixth Circuit, this case should be accepted to establish the principal in a case of first impression.

This Court has hinted at, but not yet held, that speech about "public harm" is entitled to a greater protection under the First Amendment than speech about "public concern". Is not a warning that the K-9 on the street may bite you if it is not properly trained, more important for the public to know than a warning that public funds are being squandered or that racial discrimination is occurring? That hierarchy of concerns is not recognized in the Sixth Circuit. This case must be accepted and reversed to redress misplaced priorities.

B. It must be clarified that the official duty to speak standard in *Garcetti v. Ceballos* does not include a warning of harm as such warning is always protected speech.

The caveats of this court in *Garcetti v. Ceballos, supra*, have been ignored and disregarded. In that case "official duties" were undisputed. In this case they were never addressed and no opportunity to addr ss them was given. The panel decision's standard "on duty, in uniform, and engages in discussions with supervisors" and "communicating solely to his superior proves speech as a public employee" far exceeds what this Honorable Court propounded, "We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions". This excessively broad test was applied without any evidence in the record as to what speech duties the K-9 officer's duties entailed. If this precedent is permitted to stand, then the only people with knowledge of danger, and who should warn, will not do so for fear of retaliation for being insubordinate.

Innocent and unsuspecting John Q. Public has a right to know that a K-9 dog may bite. He has the right to know if armed police officers are trained when to shoot. He has a right to know if a police officer is properly trained to subdue a citizen with a taser without serious injury. This is not a case about remote, speculative, consequences. The "widespread costs of repressed dialogue" is best characterized by the factual consequences of this inadequate training policy, the criticism of which caused David H. Haynes to be fired. Inadequate training continued. Subsequently another Circleville K-9 officer, Ed Haning, decided to apprehend the town drunk on probation by releasing the K-9 from the cruiser with a command to apprehend. The drunk ran into a local bar. A 62 year old woman was dancing, minding her own

business. The dog failed to recall. The dog ran into the bar and bit the patron. It refused to release its clamped jaws upon command. The K-9 officer had to order the dog to attack him to end the situation. The patron suffered permanent nerve injury to her foot. The experience caused her mental suffering. To this date she fears dogs.

The Constitution of the United States was created to protect the rights of citizens. One such right is the right to liberty, which includes the right to be free from governmental harm. Unless the one in the know can raise a hue and cry, everyday citizens cannot question the propriety of keeping the dog on the street, they cannot protest to remove it from service and they cannot know to avoid its presence.

The Constitution should, like a doctor, do no harm. By allowing the alarm to be spread, the constitution rightfully muzzles the dog. If this decision stands, the Constitution wrongfully muzzles the police officer and denies "informed vibrant dialogue in a democratic society". If "in uniform, on the clock talking to the chief" is always official duty, then every police officer wears a muzzle at all times. Every citizen on the street or in a bar is at risk of being harmed by a poorly trained police officer.

Justices Souter, Stevens and Ginsburg, in their dissent in *Garcetti v. Ceballos, supra,* acknowledge Petitioner's claim that "threats to health and safety can outweigh the government's stake in the efficient implementation of policy". Petitioner believes the Court was making it clear that public safety cases are not governed by the decision. The proper holding must be reiterated and re-emphasized.

C. It must be established that the First Amendment protects against retaliation for refusing to lie under oath.

In addition to the warning of physical harm, David H. Haynes also claimed he was retaliated against because he said he would testify honestly in court that the dog was not adequately trained. It was this statement that Chief Gray perceived to be a "threat". Justices Souter, Stevens and Ginsburg in their dissent stated:

> upon remand, it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to trooper testimony in court must surely be analyzed independently to protect the integrity of the judicial process.

D. It must be established that inadequate State remedies do not protect First Amendment rights.

Petitioner's state whistleblower claim was also dismissed. The State statute was inadequate to protect such a valuable right. The deployment of a dog is subject to a qualified immunity defense and therefore the threat of a private suit is no deterrent to dangerous conduct, *Martha Smith v. Ed Haning et al.*, Unreported C2-04-CV-1117 District Court, Southern District Ohio, Eastern Division (negligent dog bite mentioned above not actionable). Related appeal dismissed 4/26/06, unreported Sixth Circuit No 06-3247.

E. Remand to develop the record is the proper remedy when Supreme Court precedent intervenes.

Finally, the Court entered the wrong remedy. It reversed and dismissed for defendants on all claims. When this Honorable Court decided *Garcetti v. Ceballos, supra,* it remanded the case for determination if some speech was outside the ambient of utterances pursuant to official duties. Petitioner had a right to be treated the same as Mr. Garcetti. Mr. Haynes was denied the right to supplement the record in regard to official duties. At least this claim should have survived dismissal as it was independent of the warning claim. The court should have remanded to determine the scope of David H. Haynes' official duties and if his speech was outside of his official duties–which it was.

CONCLUSION

Public employees with knowledge that government use of force policies are inadequate and will cause injury must be permitted to raise the hue and cry of public harm and safety or every citizen is at risk to be harmed from what they blissfully perceive to be safe actions. Disclosures about public safety deserve greater protection under the First Amendment than disclosures involving merely public concern. Any balancing test involving it must favor disclosure unless there is substantial disruption of the operation of the governmental office. In uniform, on the clock, talking to the boss, does not define "official duties". If it does, it is constitutionally too broad. There should never be a constitutional protection of one who requests another to lie in court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-3070

[Filed June 15, 2007]

DAVID H. HAYNES, Plaintiff-Appellee,	)
v.	)
CITY OF CIRCLEVILLE, ET AL., Defendants-Appellants.	)

BATCHELDER, GILMAN, and SUTTON, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk/m

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-3070

[Filed January 25, 2007]

DAVID H. HAYNES, Plaintiff-Appellee,	)
v.	)
CITY OF CIRCLEVILLE, OHIO et al., Defendants-Appellants.	)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0037p.06

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 03-01146—Terence P. Kemp, Magistrate Judge.

Argued: December 6, 2006

Decided and Filed: January 25, 2007

Before: BATCHELDER, GILMAN, and SUTTON, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge. David H. Haynes, a former City of Circleville police officer and handler for the police department's canine unit, filed suit against the City and Police Chief Harold Wayne Gray, Jr. in the Pickaway County (Ohio) Court of Common Pleas. He alleged a violation of Ohio's whistleblower statute, a violation of common law public policy, and retaliatory discharge for exercising his First Amendment rights. Haynes contends that he was fired for protesting proposed cutbacks in canine training. He asserted that this reduction in training was likely to cause an imminent risk of physical harm to the public. The defendants removed the lawsuit to the United States District Court for the Southern District of Ohio, where they subsequently moved for summary judgment on all of the claims against them. Chief Gray also raised the defense of qualified immunity.

The district court granted the defendants' motion as to Haynes's state-law claims, but denied the motion as to the First Amendment retaliation claim. Chief Gray timely filed an interlocutory appeal for review of the court's decision to deny him the defense of qualified immunity. For the reasons set forth below, we **REVERSE** the district court's judgment as to Chief Gray and **REMAND** with instructions to dismiss the First Amendment claim as to both defendants.

I. BACKGROUND

A. Factual background

In April of 1991, Circleville hired Haynes as a patrolman. The City authorized the creation of a canine unit in 1996. Haynes claims that Circleville's decision to do so was based at least in part on research and input from both himself and former Chief of Police John Kinney. Chief Gray replaced Chief Kinney in January of 1999. According to Haynes, the canine unit is classified as part of the patrol unit, so Haynes was still considered a patrolman as well as a canine handler from the time the canine unit was created. Haynes and Circleville entered into a separate employment agreement to cover Haynes's duties as a canine handler. This agreement was an addendum to the collective bargaining agreement between the Ohio Patrolmen's Benevolent Association and Circleville that covered Haynes's duties as a patrolman.

When the canine unit was created, Haynes was paired with a dog named Bronco for approximately three and a half years. Haynes worked as a patrol officer for 28 hours per week and spent 12 hours per week training his dog. The canine training took place at Wachtmeister Canine Training, Ltd. in Dublin, Ohio, and the 12 hours of weekly training generally occurred during the course of one day. According to Haynes, he and Bronco routinely spent no more than 4 hours of the day in Dublin on actual training. Haynes occasionally spent more than 12 hours per week at Wachtmeister, including time spent for travel and meals. He was paid for all of this additional time.

Haynes resigned from the Circleville police force in the fall of 2000 in order to serve a one-year tour of duty in Kosovo as a police monitor with the U.S. State Department.

Upon his return to Ohio in the fall of 2001, Chief Gray rehired Haynes in his former patrol and canine-handler capacities. Haynes claims that Circleville considered him to be the administrator of the canine program, in addition to being a handler, from October of 2002 through January of 2003.

In February of 2003, Chief Gray instituted a cost-containment measure under which canine handlers and their dogs were allowed to train at Wachtmeister only once every three weeks rather than weekly. Chief Gray also informed Haynes that the maximum compensation for any training day spent in Dublin would be limited to eight hours, including travel time.

Haynes was upset with this turn of events, prompting him to write a long memo to Chief Gray that expressed his displeasure at the reduction in training. The February 24, 2003 memo stated in pertinent part as follows:

> Now we are about to change boats mid-stream and I expect that there will be serious negative consequences for doing so. Words like "deliberate indifference," "negligence" and "failure to train" will someday be brought up with respect to the Circleville Police Department's Canine Program. My response will be, "I told them so."
>
> . . .
>
> You know, or should know, that any deviation from the old training regime will probably result in an expensive learning experience. But I will not be paying the bill. You have received my last words of caution. It is all on you now—I hope nothing bad comes of it. I will train K9 Rex in accordance with

> this new plan, no overtime on Dublin weeks and no more than 2 hours on Circleville weeks--172 hours per year. It will be interesting.
>
> . . .
>
> I guess that despite the fact that I trained the dog; have over 6,000 hours of Canine Training experience, over 15 years of Law Enforcement experience does not warrant a consultation.

Chief Gray responded by letter on February 27, 2003, addressing Haynes's concern about the cutbacks in training in some detail. He offered Haynes the choice of complying with the new training parameters or resigning from his position as a canine handler. Shortly thereafter, a scheduling officer called Haynes on a day when his shift was close to starting and asked him to report for duty and assist with a drug search. Haynes refused to come in. The parties dispute why he refused. Haynes claims that he was feeling the effect of withdrawal from Paxil, a prescription antidepressant medication, and was unfit to come in to work. The officer who called Haynes, on the other hand, said that Haynes flatly refused to come in, without explanation, and told the officer "that's just the way it goes." After Haynes refused to report for work, Chief Gray relieved Haynes of his duties as a canine handler.

Chief Gray subsequently placed Haynes on administrative leave as of March 10, 2003 and ordered a psychological evaluation. The psychological evaluation was scheduled for March 13, 2003. Under Ohio law, "[a]n appointing authority may require that an employee submit to medical or psychological examinations." Ohio Admin. Code 123:1-33-01 (2004). An employee's "refusal to submit to an examination, the unexcused failure to appear for an examination, or the

refusal to release the results of an examination amounts to insubordination, punishable by the imposition of discipline up to and including removal." *Id.* Haynes notified Chief Gray that he would not submit to the examination until he had time to seek the advice of his attorney, although he was not "refusing" to participate in the evaluation.

Later in the day on March 10, 2003, officers went to Haynes's house to pick up his canine equipment. Haynes gave the officers a box wrapped in Christmas paper that contained the equipment. Affixed to the box was a Daffy Duck tag addressed to Chief Gray that read "Do not open until Christmas." Haynes described this action as "controlled venting."

B. Procedural background

On March 12, 2003, Haynes notified Chief Gray that he was filing a labor grievance with the City and with the Circleville Police Department, claiming that there had been no cause to remove him from his canine-handler duties, to place him on administrative leave, or to order him to submit to a psychological evaluation. The record does not reflect the outcome of this grievance procedure, or whether a formal grievance was even filed.

Chief Gray notified Haynes on March 18, 2003 that Haynes would be subject to a pre-disciplinary hearing on March 24, 2003. The purpose of the hearing was to give Haynes a chance to respond to the following allegations of misconduct: multiple counts of insubordination, neglect of duty, unsatisfactory performance, disrespect, failure to report to duty as required, conduct unbecoming an officer, and sick-leave violations. Haynes's attorney asked for a one-day continuance, which was granted. In the interim, Haynes's

attorney proposed a settlement under which Haynes would resign as a canine handler but would retain his job as a patrolman. The attorney's settlement letter stated that "[i]t is unfortunate that what was intended to be a thoughtful, provocative, intelligent exchange of information to work out a training disagreement was perceived and misapprehended to be a 'threat.'" Whether any settlement discussions actually took place is not reflected in the record.

The disciplinary hearing took place as rescheduled on March 25, 2003. Haynes explained that the intent of his February 24, 2003 memo was not to be insubordinate, but to "cover his rear end in court" should there be legal ramifications as a result of the reduced canine training. Haynes and Chief Gray discussed the other allegations in detail, concluding with Chief Gray noting that "the situation we're in has caused a lot [of] turmoil and a lot of problems for our department." Circleville terminated Haynes's employment the next day.

Haynes filed suit in the state Court of Common Pleas against Chief Gray and Circleville in November of 2003, asserting a claim under Ohio Rev. Code Ann. § 4113.52 (Ohio's whistleblower statute), a violation of common law public policy, and a claim for retaliatory discharge based on the exercise of his First Amendment rights. The defendants removed the suit to federal court. They later moved for summary judgment on all claims. Particularly relevant to this appeal, Chief Gray argued that he was entitled to judgment as a matter of law on the ground of qualified immunity. The district court disagreed. Chief Gray timely filed this interlocutory appeal from the denial of qualified immunity.

II. ANALYSIS

A. Standard of review

"A denial of summary judgment is generally not a final judgment." *Hoover v. Radabaugh*, 307 F.3d 460, 465 (6th Cir. 2002). But a denial of summary judgment on the ground of qualified immunity "may be appealed as [a] collateral order[] where (1) the defendant is a public official asserting the defense of qualified immunity, and (2) the issue appealed concerns not which facts the parties might be able to prove, but whether certain alleged facts reflect a violation of clearly established law." *Id.*

We review de novo a district court's denial of summary judgment on the ground of qualified immunity. *Swiecicki v. Delgado*, 463 F.3d 489, 497 (6th Cir. 2006). Application of the qualified-immunity doctrine is a question of law; "to the extent that there is disagreement about the facts, . . . we must review the evidence in the light most favorable to the Plaintiff, taking all inferences in his favor." *Id.* (brackets omitted).

B. Qualified immunity

When government officials are performing discretionary functions, their actions are generally shielded from civil liability as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). If a government official is granted qualified immunity, he or she is immune from suit over the asserted claim. *Hoover*, 307 F.3d at 465.

This court typically employs a two-step analysis in determining whether an official is entitled to qualified immunity: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established." *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310-11 (6th Cir. 2005) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). In addition, this court occasionally utilizes a third step: (3) "whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Swiecicki*, 463 F.3d at 498. The three-step approach "may in some cases increase the clarity of the proper analysis." *Id.* "If, on the other hand, the case at issue is one of the many cases where, if the right is clearly established, the conduct at issue would also be objectively unreasonable, then this court has collapsed the second and third prongs in an effort to avoid duplicative analysis." *Id.* (brackets and quotation marks omitted).

Once Chief Gray raised the defense of qualified immunity, Haynes bore the burden of demonstrating that Chief Gray was not entitled to it. *See id.* The district court "concluded that, construing the facts in Mr. Haynes' favor, portions of Mr. Haynes' memorandum are protected by the First Amendment and terminating Mr. Haynes for expressing his protected First Amendment rights is violative of the Constitution." Referencing the "extensive jurisprudence" on the First Amendment, the court ruled that "a reasonable official would have recognized both that Mr. Haynes engaged in protected speech and that departmental concerns did not justify retaliatory action based on that speech, either standing alone or as a substantial factor in the adverse job action."

1. First Amendment violation

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." *Hoover*, 307 F.3d at 466. Haynes alleges that he was terminated in retaliation for exercising his First Amendment rights by speaking out against the reduced canine-training program.

This court has developed a three-step test for analyzing a public employee's claim of First Amendment retaliation. First, Haynes must show that, as a matter of law, the speech at issue was protected. *See Taylor v. Keith*, 338 F.3d 639, 643 (6th Cir. 2003). To do so, he must demonstrate both that the speech "touches on a matter of public concern" and that "his interest in the speech outweighs the government's countervailing interest in promoting the efficiency of the public service it provides as an employer." *Id.* Haynes must next show that his termination by Chief Gray "would chill an ordinary person in the exercise of his First Amendment rights." *Id.* Finally, he "must present sufficient evidence to create a genuine issue as to whether his speech was a substantial or motivating factor in the employer's decision to discipline or dismiss." *Id.*

In May of 2006, the Supreme Court decided *Garcetti v. Ceballos*, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), holding that "when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960 (emphasis added). This holding controls the outcome of the present case.

Ceballos, the plaintiff in *Garcetti*, was a deputy district attorney in the Los Angeles County District Attorney's Office. 126 S. Ct. at 1955. At the time of the events giving rise to his complaint, Ceballos was a calendar deputy, which placed him in a supervisory capacity over other deputies. *Id.* A defense attorney informed Ceballos that there were inaccuracies in an affidavit used to obtain a critical search warrant in a case pending against the defense attorney's client. *Id.* Ceballos conducted an investigation, determined that the affidavit indeed contained serious misrepresentations, and wrote a memo to his supervisor recommending dismissal of the case based on the defective affidavit. *Id.* at 1955-56. After Ceballos's supervisors met to discuss the situation, his immediate supervisor continued to prosecute the case. *Id.* at 1956. At a hearing on the defendant's motion to suppress, Ceballos was called by the defense to testify about his concerns regarding the affidavit. *Id.*

Ceballos claimed that, following these events, the District Attorney's Office retaliated against him for speaking out by reassigning him from a calendar-deputy position to a trial-deputy position, transferring him to another courthouse, and denying him a promotion. *Id.* After losing an internal employment grievance, Ceballos sued the District Attorney's Office on a theory of First Amendment retaliation under 42 U.S.C. § 1983.

The Supreme Court began its opinion by discussing the First Amendment analysis set forth in *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), and *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), noting that "[this] Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment." 126

S. Ct. at 1957. "[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id. Pickering* balancing initially "requires determining whether the employee spoke as a citizen on a matter of public concern." *Id.* at 1958. "If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.*

When the answer is yes, however, the "question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* The Court ultimately rejected Ceballos's claim that his speech was protected by the First Amendment, holding that "[t]he controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy." *Id.* at 1959-60. It noted that "[t]he fact that his duties sometimes required him to speak or write does not mean that his supervisors were prohibited from evaluating his performance." *Id.* at 1960.

The key issue in the present case, then, is whether or not Haynes's expressions were made pursuant to his duties as a canine handler and patrolman for Circleville. Without the benefit of the Supreme Court's later decision in *Garcetti*, the district court did not focus on this issue. It instead concluded that the interest of Mr. Haynes as a citizen, "in commenting on matters of public concern, outweigh[ed] the interest of the Chief and the City in promoting efficiency of the public service it performs through its employees."

Haynes states that he was involved with the development of the canine program from its inception, and that he had developed the standard operating procedure for the canine unit. This standard operating procedure, according to Haynes,

is still in use today. Haynes claims that he was considered the administrator of the program for most of its existence. The thrust of Haynes's memo to Chief Gray was thus his concern over cutbacks in canine training.

Haynes concedes that both the "Christmas present" and the February 24, 2003 memo were in response to Chief Gray's planned changes to the canine-training program. Chief Gray, unhappy with Haynes's behavior and attitude, responded in kind, first by placing Haynes on administrative leave and later taking action that culminated in Haynes's termination. Haynes's own lawyer characterized the dispute as a training disagreement. The proposed cutbacks still undeniably complied with Ohio law. At the end of the February 24 memo, Haynes in fact agreed to follow the new training schedule, commenting that "[i]t will be interesting." The context of the memo as a whole is best characterized as that of a disgruntled employee upset that his professional suggestions were not followed as they had been in the past.

In lodging his protests to Chief Gray against the training cutbacks, Haynes was acting as a public employee carrying out his professional responsibilities. *See Garcetti*, 126 S. Ct. at 1960 ("When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee."). Haynes's speech is therefore unprotected as a matter of law because all of the speech at issue in this case, like the speech at issue in *Garcetti*, was made pursuant to his official duties. *See id.* ("Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.").

As a police officer, Haynes had developed the standard operating procedure for the canine unit and worked with his dog as part of his day-to-day professional activities. His memo to Chief Gray, made pursuant to these professional duties, is not protected under the First Amendment. *See Mills v. City of Evansville*, 452 F.3d 646, 648 (7th Cir. 2006) (holding that a police sergeant's speech was not protected under *Garcetti*, where the sergeant was "on duty, in uniform, and engaged in discussion with her superiors"). The fact that Haynes communicated solely to his superior also indicates that he was speaking "in [his] capacity as a public employee contributing to the formation and execution of official policy," *see Mills*, 452 F.3d at 646, not as a member of the public writing a letter to the editor as in *Pickering*.

At the time that Haynes sent his memo in February of 2003, he was simply speculating that someday there could be a negative incident that might result from the reduction in canine training. Haynes's memo focused on his discontent with the new program, which he later admitted in his deposition was in compliance with Ohio law. The memo thus reflects nothing more than "the quintessential employee beef: management has acted incompetently." *Barnes v. McDowell*, 848 F.2d 725, 735 (6th Cir. 1988). Haynes's invocation in his memo of legal terms such as "deliberate indifference" and "failure to train" do not, without more, render Haynes's speech a matter of public concern. *See Rahn v. Drake Ctr., Inc.*, 31 F.3d 407, 412-13 (6th Cir. 1994) (holding that the employee's reference to "patient endangerment" in a press release did not make the speech a matter of public concern where the focus of the speech "is on the employees' discontent with new *work* rules which *might* lead to a patient endangerment situation") (emphasis in original).

In short, the district court erred in concluding that Haynes's memo constituted protected speech even under the law of this circuit prior to *Garcetti*. Haynes thus has no First Amendment cause of action even if Chief Gray did fire him as a direct result of either the memo or the ill-fated "Christmas gift."

2. No violation of a clearly established right

Because Haynes's speech took place pursuant to his official duties as a police officer, he cannot establish that a constitutional violation took place. *See Garcetti*, 126 S. Ct. at 1961 (concluding that the plaintiff's claim of unconstitutional retaliation failed because the First Amendment "does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities"); *Thomson v. Scheid*, 977 F.2d 1017, 1021 (6th Cir. 1992) (holding that the plaintiff's speech undertaken in the course of acting as a public employee was unprotected). Haynes is *a fortiori* unable to satisfy the second prong of the qualified-immunity analysis--that the constitutional right was clearly established.

C. Retaliation claim against Circleville

Our determination that Haynes's memo is not protected speech because it was written pursuant to his official duties as a police officer applies equally to his retaliation claim against the City of Circleville. Haynes's First Amendment claim against the City therefore fails as a matter of law.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court as to Chief Gray and **REMAND**

the case with instructions to dismiss the First Amendment claim as to both defendants.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:03-cv-1146

[Filed December 1, 2005]

David H. Haynes,	)
Plaintiff,	)
	)
v.	)
	)
City of Circleville, et al.,	)
Defendants.	)
	)

MAGISTRATE JUDGE KEMP

OPINION AND ORDER

This matter is before the Court on three motions filed by the parties involved in this case: defendants' Rule 37 motion to exclude plaintiff's expert report and testimony; plaintiff's motion to allow expert report; and defendants' motion to strike the affidavit of Jeff Moody. All motions concern the admission of Jeff Moody's expert testimony. For the following reasons, the defendants' Rule 37 motion to exclude plaintiff's expert report and testimony and defendants' motion

to strike the affidavit of Jeff Moody will be granted, and plaintiff's motion to allow expert report will be denied.

Pursuant to Fed.R.Civ.P. 16, this Court entered a preliminary pretrial order. Concerning expert testimony, the Court stated:

> If plaintiff seeks to establish a matter affirmatively through the use of expert testimony, he shall identify such expert by August 29, 2004. The manner of identification shall be by way of the disclosures required by Fed. R. Civ. P. 26(a)(2), which reads in full:
>
> "Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; and exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.["]

> If defendants desire to use expert testimony directed to that subject matter, they shall identify, in the same manner, such expert by September 30, 2004. Pursuant to Fed. R. Civ. 26(b)(4)(A), leave of court is not required in order to depose a testifying expert.

Preliminary Pretrial Order, April 4, 2004.

On May 3, 2004, Mr. Haynes informed the City of Circleville ("City") and Police Chief Gray, in a response to defendants' interrogatories, that Jeff Moody may be one of five potential expert witnesses called by Mr. Haynes in this case. Mr. Haynes admits, however, that despite identifying Mr. Moody as a potential expert witness, Mr. Haynes did not submit Mr. Moody's report to the City or Police Chief Gray until June 1, 2005. Because of the untimely filing of Mr. Moody's expert report, the defendants moved this Court to exclude Mr. Moody's testimony. Additionally, Mr. Haynes moved to allow Mr. Moody's expert report.

In both the motion to exclude plaintiff's expert report and testimony and motion to strike the affidavit of Jeff Moody, the defendants argue that Mr. Haynes' disregard for the expert testimony deadline established in the pretrial order cannot be "substantiated" and was "harmful and prejudicial." Specifically, the City and the Chief claim that they were without the benefit of Mr. Moody's report when conducting the deposition of Mr. Haynes. The City and the Chief argue that they "would certainly have incorporated the information contained in Plaintiff's expert report into the deposition of Plaintiff." Defendants' Rule 37 motion to exclude plaintiff's expert report and testimony at p. 5. The defendants argue that they disclosed their expert reports in a timely manner, which gave Mr. Haynes the benefit of reviewing and using their

expert reports when conducting the depositions of Police Chief Gray and other defense witnesses.

In the motion to strike the affidavit of Jeff Moody, the City and the Chief claim that the affidavit is a "back door" attempt to introduce Mr. Moody's testimony because, according to the affidavit, Mr. Moody prefaces his statements by stating, "[a]ll of my opinions below are to a reasonable degree of dog handling certainty." Defendant's motion to strike the affidavit of Jeff Moody at p. 3. Because the defendants did not receive Mr. Moody's expert report until June 1, 2005, they request that this Court exclude Mr. Moody's expert report from use in hearings, motions and all other proceedings pursuant to Fed.R.Civ.P. 37.

In response, Mr. Haynes contends that the defendants received proper notice when he filed his interrogatory responses identifying Mr. Moody as one of five potential expert witnesses. Mr. Haynes also claims that he submitted Mr. Moody's expert report on June 1, 2005 because "the report was not available until that time." Plaintiff's memorandum contra to sanctions at p. 1. Additionally, Mr. Haynes argues that the City and the Chief "knew" Mr. Moody's opinions regarding this case through previous correspondences, so the failure to comply with the deadline was not prejudicial to the defendants. Finally, Mr. Haynes' counsel stated:

> Plaintiffs' counsel is a soul [sic] practitioner. His Federal practice is limited. Attorneys in state court practice with civility. Counsel does not have to run to court each time a discovery deadline is approaching so long as the other counsel does not object. That point was missed by this counsel who for sure will adhere

> to all future dead lines [sic] and he will make sure Defendant's counsel does also.

Id. at p. 3.

Fed.R.Civ.P. 16(b) requires the Court, in each civil action which is not exempt from that rule, to "enter a scheduling order that limits the time" to, inter alia, file motions, identify expert witnesses, and complete discovery. The rule further provides that "[a] schedule shall not be modified except upon a showing of good cause ...." Id.

Although the Court has broad discretion to modify its own pretrial orders, it must be remembered that "[a]dherence to reasonable deadlines is ... critical to maintaining integrity in court proceedings," Rouse v. Farmers State Bank, 866 F.Supp. 1191, 1199 (N.D. Iowa 1994), and that pretrial scheduling orders are "the essential mechanism for cases becoming trial-ready in an efficient, just, and certain manner." Id. at 1198. In evaluating whether the party seeking modification of a pretrial scheduling order has demonstrated good cause, the Court is mindful that "[t]he party seeking an extension must show that despite due diligence it could not have reasonably met the scheduled deadlines." Deghand v. Wal-Mart Stores, 904 F.Supp. 1218, 1221 (D. Kan. 1995). The focus is primarily upon the diligence of the movant; the absence of prejudice to the opposing party is not equivalent to a showing of good cause. Tschantz v. McCann, 160 F.R.D. 568, 571 (N.D. Ind. 1995). Of course, "[c]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." Dilmer Oil Co. v. Federated Mut. Ins. Co., 986 F.Supp. 959, 980 (D.S.C. 1997). Further, although the primary focus of the inquiry is upon the moving party's diligence, the presence or absence of prejudice to the other party or parties is a factor to

be considered. Inge v. Rock Financial Corp., 281 F.3d 613 (6th Cir. 2002). It is with these standards in mind that the instant motion will be decided.

In the case before this Court, Mr. Haynes filed Mr. Moody's expert report ten months after the deadline established in the preliminary pretrial order. Additionally, one year after that same deadline elapsed, Mr. Haynes filed a motion to allow Mr. Moody's expert report.

Mr. Haynes' excuse that Mr. Moody's expert report was not available until June 1, 2005 could conceivably be a reasonable explanation that, despite due diligence, Mr. Haynes could not have reasonably met the scheduled deadlines, although that would depend on the reasons that the report was not available. Nevertheless, there is no reason why Mr. Haynes could not have requested an extension of the expert report deadline prior to August 24, 2004. Nothing in the record suggests that Mr. Haynes was prevented from requesting an extension if Mr. Haynes knew the expert report was not prepared. Further, identifying five potential expert witnesses in a response to interrogatories is not reasonable notice of the contents of those experts' opinions, nor is it proper to argue that the opposing party should have anticipated what the expert was going to conclude. Discovery deadlines are an essential mechanism for cases becoming trial-ready in an efficient, just, and certain manner, and attempting to enforce those deadlines does not indicate a lack of civility. Finally, according to the record, the defendants were prejudiced by Mr. Haynes' actions when they conducted discovery because they deposed Mr. Haynes without the assistance of Mr. Moody's report, which, according to them, could have assisted them in their deposition preparation and in the deposition itself. Mr. Haynes was not subjected to the same prejudice because it appears that the defendants filed all

of their expert reports in accordance with the preliminary pretrial order.

In sum, Mr. Haynes failed to comply with the preliminary pretrial order and Fed.R.Civ.P. 26(a)(2). Mr. Haynes has failed to prove good cause pursuant to Fed.R.Civ.R. 16 in order for this Court to modify and extend the discovery deadlines for an expert report. Additionally, it appears that Mr. Moody's affidavit is an attempt to circumvent the expert report rules and introduce Mr. Moody's opinions into evidence. Therefore, defendants' Rule 37 motion to exclude plaintiff's expert report (doc. #40) and testimony and motion to strike the affidavit of Jeff Moody (doc. #54) are GRANTED. Plaintiff's motion to allow Mr. Moody's expert report (doc. #52) is DENIED. Accordingly, pursuant to Fed.R.Civ.P. 26 and 37, Mr. Haynes is prohibited from using Mr. Moody's expert testimony "as evidence at a trial, at a hearing, or on a motion." Fed.R.Civ.P. 37(c).

/s/ Terence P. Kemp
United States Magistrate Judge